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Supreme Court, U.S.
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No. 00-9285

In The

Supreme Court of the United States

WALTER MICKENS, JR.,

Petitioner,

v.

JOHN B. TAYLOR, WARDEN, SUSSEX I STATE PRISON,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF OF RESPONDENT

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QUESTION PRESENTED

Did the Court of Appeals err in holding that a defendant must show an actual conflict of interest and an adverse effect in order to establish a Sixth Amendment violation where a trial court fails to inquire into a potential conflict of interest about which it reasonably should have known?

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TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 1

I. The Crime 1

II. The Trial and First Appeal 4

III. The Second Sentencing 7

IV. The Second Appeal and Habeas Corpus Proceedings 8

V. The Federal Habeas Corpus Proceedings 8

SUMMARY OF ARGUMENT 16

ARGUMENT 17

I. THE COURT OF APPEALS CORRECTLY HELD THAT A FEDERAL HABEAS CORPUS PETITIONER MUST SHOW AN ACTUAL CONFLICT OF INTEREST AND AN ADVERSE EFFECT TO ESTABLISH A SIXTH AMENDMENT VIOLATION WHERE A TRIAL COURT FAILS TO INQUIRE INTO A POTENTIAL CONFLICT OF INTEREST ABOUT WHICH IT REASONABLY SHOULD HAVE KNOWN 17

II. THE DISTRICT COURT AND COURT OF APPEALS CORRECTLY APPLIED *SULLIVAN* IN REJECTING MICKENS' CLAIMS 34

A. Saunders' Successive Representation Presented a Reduced Risk of "Actual Conflict" 37

TABLE OF CONTENTS – Continued

Page

B. Mickens Failed to Show That an Actual Conflict Adversely Affected Saunders' Performance 38

1. Consent Defense 40

2. Negative Information 44

3. Unrelated "Deficient" Investigation 46

CONCLUSION 48

TABLE OF AUTHORITIES

Page

CASES

Anderson v. City of Bessemer City, 470 U.S. 564 (1985) 40

Burger v. Kemp, 483 U.S. 776 (1987) 33, 37, 39, 44

Calderon v. Thompson, 523 U.S. 538 (1998) 43

Crisp v. Duckworth, 743 F.2d 580 (7th Cir. 1984), *cert. denied*, 469 U.S. 1226 (1985) 34

Cuyler v. Sullivan, 446 U.S. 335 (1980) ..... *passim*

Dixson v. Quarles, 627 F. Supp. 50 (E.D. Mich), *aff'd*, 781 F.3d 534 (6th Cir. 1985), *cert. denied*, 479 U.S. 935 (1986) 34

Dukes v. Warden, 406 U.S. 250 (1972) 26, 37

Foxworth v. Wainwright, 516 F.2d 1072 (5th Cir. 1975) 23

Freund v. Butterworth, 165 F.3d 839 (11th Cir.), *cert. denied*, 528 U.S. 817 (1999) 39

Glasser v. United States, 315 U.S. 60 (1942) 19, 20, 21, 24, 26, 37

Gray v. Netherland, 518 U.S. 152 (1996) 18

Hoke v. Commonwealth, 377 S.E.2d 595 (Va.), *cert. denied*, 491 U.S. 910 (1989) 41

Holloway v. Arkansas, 435 U.S. 475 (1978) ..... *passim*

Holloway v. State, 539 S.W.2d 435 (1976) 22

Kirkpatrick v. Butler, 870 F.2d 276 (5th Cir. 1989), *cert. denied*, 493 U.S. 1051 (1990) 34

TABLE OF AUTHORITIES – Continued

Page

Lipson v. United States, 233 F.3d 942 (7th Cir. 2000) 28

Mackall v. Commonwealth, 372 S.E.2d 759 (Va. 1988), *cert. denied*, 492 U.S. 925 (1989) 37

Mannhalt v. Reed, 847 F.2d 576 (9th Cir.), *cert. denied*, 488 U.S. 908 (1988) 38

Mickens v. Commonwealth, 442 S.E.2d 679 (Va. 1994) 6

Mickens v. Commonwealth, 457 S.E.2d 9 (Va. 1995) 6

Mickens v. Commonwealth, 478 S.E.2d 302 (Va. 1996) 8

Mickens v. Greene, 74 F. Supp. 2d 586 (E.D. Va. 1999) 11

Mickens v. Virginia, 513 U.S. 922 (1994) 6

Mickens v. Virginia, 520 U.S. 1269 (1997) 8

Mickens v. Taylor, 240 F.3d 348 (4th Cir. 2001) 15

Mickens v. Taylor, 227 F.3d 203 (4th Cir. 2000) 15

Mosley v. Scully, 908 F. Supp. 1120 (E.D. N.Y. 1995) 34

Murray v. Carrier, 477 U.S. 478 (1986) 26

Nix v. Whiteside, 475 U.S. 157 (1986) 36

Perrillo v. Johnson, 79 F.3d 441 (5th Cir. 1996) 39

Saffle v. Parks, 494 U.S. 484 (1990) 29

Simmons v. South Carolina, 512 U.S. 154 (1994) 6

Smith v. Commonwealth, 248 S.E.2d 135 (Va. 1978), *cert. denied*, 441 U.S. 967 (1979) 43

Smith v. Robbins, 528 U.S. 259 (2000) 32

Smith v. White, 815 F.2d 1401 (11th Cir.), *cert. denied*, 484 U.S. 863 (1987) 38

TABLE OF AUTHORITIES – Continued

Page

Stoia v. United States, 109 F.3d 392 (7th Cir. 1997) 28, 39

Strickland v. Washington, 466 U.S. 668 (1984) 18, 26, 32, 34, 42

Swidler & Berlin v. United States, 524 U.S. 399 (1998) 36

Teague v. Lane, 489 U.S. 288 (1989) 29

Thacker v. Bordenkircher, 590 F.2d 640 (6th Cir.), *cert. denied*, 442 U.S. 912 (1979) 23

United States v. Addonizio, 442 U.S. 178 (1979) 34

United States v. Atkinson, 565 F.2d 1283 (4th Cir. 1977), *cert. denied*, 436 U.S. 944 (1978) 23

United States v. Carrigan, 543 F.2d 1053 (2d Cir. 1976) 22, 23

United States v. Cox, 580 F.2d 317 (8th Cir. 1978), *cert. denied*, 439 U.S. 1075 (1979) 23

United States v. Cronic, 466 U.S. 648 (1984) 36, 32

United States v. Fahey, 769 F.2d 829 (1st Cir. 1985) 28, 38, 39

United States v. Frady, 456 U.S. 152 (1982) 26, 34

United States v. Gambino, 864 F.2d 1064 (3d Cir. 1988), *cert. denied*, 492 U.S. 906 (1989) 38, 39

United States v. Kutas, 542 F.2d 527 (9th Cir. 1976), *cert. denied*, 429 U.S. 1073 (1977) 23

United States v. Lovano, 420 F.2d 769 (2d Cir.), *cert. denied*, 397 U.S. 1071 (1970) 23

TABLE OF AUTHORITIES – Continued

Page

United States v. Mandell, 525 F.2d 671 (7th Cir.) (1975), *cert. denied*, 423 U.S. 1049 (1976) 23

United States v. Mays, 77 F.3d 906 (6th Cir. 1996) 39

United States v. Migliaccio, 34 F.3d 1517 (10th Cir. 1994) 28, 39

United States v. Miskinis, 966 F.2d 1263 (9th Cir. 1992) 28, 39

United States v. Morrison, 449 U.S. 361 (1981) 18

United States v. Tatum, 943 F.2d 370 (4th Cir. 1991) 28

Weeks v. Commonwealth, 450 S.E.2d 379 (Va. 1994), *cert. denied*, 516 U.S. 829 (1995) 45

Wheat v. United States, 486 U.S. 153 (1988) 34, 36

Winfield v. Commonwealth, 301 S.E.2d 15 (Va. 1983), *cert. denied*, 516 U.S. 829 (1995) 42

Winkler v. Keane, 7 F.3d 304 (2d Cir. 1993), *cert. denied*, 511 U.S. 1022 (1994) 39

Wood v. Georgia, 450 U.S. 261 (1981) ..... *passim*

STATUTES AND RULES

§ 16.1-241(I), Code of Virginia 4

§ 18.2-67.7, Code of Virginia 41

§ 19.2-163.7, Code of Virginia 8

1993 Va. Acts of the Gen. Assembly, c. 978 45

F. R. Civ. P. Rule 52(a) 39

STATEMENT OF THE CASE

I. The Crime

On Monday, March 30, 1992, the body of seventeen-year-old Timothy Jason Hall was discovered on a bank of the James River in downtown Newport News, Virginia, lying face down on a mattress and partially covered by a sheet of plywood. (JA 15). Hall's body was nude from the waist down, except for socks, and his legs were spread apart approximately twelve inches. (JA 15-16, 18). The mattress was underneath the overhang of an abandoned construction company on 29th Street. (JA 9).

As petitioner concedes, the murder was particularly violent and gruesome. The autopsy identified 143 stab wounds. (JA 11). Most of the wounds were "paired" stab injuries which were consistent with two blades opened on a "Swiss Army" knife. (JA 13). The medical examiner also identified thirteen single stab wounds, one extending three and a half inches into Hall's head. (JA 11-12). The photographs of the victim show most of the wounds clustered on Hall's back and shoulders, and the back and top of his head, indicating he was attacked from behind. (JA 399-404). Hall's face had been sliced across the forehead and nose by long, "paired" incised wounds. (JA 401-402). Twenty-five wounds caused significant enough damage to internal organs and blood vessels to be classified as lethal injuries, but none would have caused immediate death. (JA 12). Hall bled to death after approximately 40 minutes. (JA 13).

There were no defensive wounds noted on the victim's body. (JA 12). Bruising on Hall's neck was consistent with a chokehold. (JA 11, 86-87). There were no injuries to Hall's penis, scrotum or anal ring. (JA 14).

At the scene, police noticed bloody "transfer stains" on the outside of the victim's thighs and a substance resembling suntan lotion close to the victim's anus. (JA 16-17). The police also recovered pubic hairs from Hall's buttocks, and semen stains from the mattress. (JA 16-17). Hall's blue jeans and underwear were found washed up at the river's edge. (JA 18). His shoes were not found at the murder scene.

For "two or three months" before his death, Tim Hall was living with fourteen-year-old Raheem Gordon and Raheem's father, Bernard Gordon, in an apartment at 28th and Washington Streets near the James River in downtown Newport News. (JA 19). Tim and Raheem shared a bedroom and also often shared clothing. (JA 20). Raheem last saw Tim alive on Saturday evening, March 26, 1992, when Hall gave Raheem a ride to a party at the nearby Towers Apartments. Tim was wearing a pair of Raheem's Nike sneakers. (JA 20). Hall was expected to attend the party later in the evening. Evidence at the Gordons' apartment indicated that Hall had returned there at some point after 9:30 p.m. and changed shirts, but never arrived at the party. Raheem was not concerned with his friend's absence on Sunday, thinking that Tim might have stayed at his mother's home. On Monday, Raheem and his father noticed the police bringing a body up from the river and learned at that time that Hall had been killed. (Tr. 5/26/93, pp. 564-569).

On Saturday, April 4, 1992, police responded to a call that a man had assaulted a juvenile. The officers found Mickens on a bicycle in the parking lot of the abandoned construction company next to the river. Mickens attempted to elude the police but was arrested nearby on the assault charge. (JA 27, 35-37). After being advised of the *Miranda* warnings, Mickens was questioned about the Hall murder. Mickens displayed guilty knowledge when he volunteered, "You didn't find any knife on me, did you," before police had mentioned how Hall was killed. (JA 28-29). The police watched Mickens "break into a full sweat to the point where he had sweat dripping off his nose and his face" when they discussed DNA testing of trace evidence. (JA 28-29).

Mickens was served with arrest warrants for the murder of Timothy Hall on the morning of Sunday, April 5, 1992. While the detective read the warrants aloud, Mickens "put his fingers in his ears" and "rocked back and forth" in his chair. (JA 37). He stopped rocking to review the photographs of his victim and then said, "I accept the warrants, I accept the charges." (JA 38, 399-404). He then explained, "Mother fucker, if I told you I accept the warrants that means I'm guilty, don't it. Take me to jail, I want to go to jail, I want to go now, I want to go now." (JA 39-40).

Two days later the police found Michael Jacobs, a local drug addict, wearing the Nike sneakers that Tim had been wearing when Raheem last saw him. (JA 20-21, 23). Jacobs had purchased the shoes from Mickens for $5.00 the previous week. (JA 23).

II. The Trial and First Appeal

Because Mickens' victim was a juvenile, the preliminary proceedings were conducted in juvenile court. *See* Va. Code § 16.1-241(I). On April 6, 1992, a juvenile court judge appointed Bryan Saunders and Warren Keeling to represent Mickens on the capital murder and related charges. (JA 2).[1]

As petitioner concedes, the prosecution had a very strong case proving Mickens' guilt. In addition to Mickens' guilty knowledge, inculpatory statements and previous possession of the murdered boy's shoes, a forensic expert in hair analysis matched Mickens' pubic hair sample to the hairs recovered from Hall's buttocks "in all identifiable microscopic characteristics." (JA 32). The fact that the hairs still had tissue attached to the roots indicated that they had been forcibly removed, consistent with the rubbing of Mickens' genitals against Hall's buttocks. (JA 33-34). DNA testing on a human sperm stain

[1] The form order for the appointment of counsel printed in the Joint Appendix is incorrect. It lists only "B. Saunders" as the attorney appointed. (JA 2). The actual form lists Saunders *and* Warren Keeling. *See* photocopy in Fourth Circuit Joint Appendix, Volume I, page 1. Mickens originally had been charged with two capital murders, one involving Hall and another involving Jonathan Woskobonik. (Fed. Hearing Tr. 1/13/99, pp. 38-39). Woskobonik also had been stabbed over 70 times and his body also was found naked from the waist down. (*Id.* at p. 65). Saunders and Keeling were combined as counsel on both cases. (*Id.* at 39). The Commonwealth, however, did not prosecute the Woskobonik case.

found on the mattress excluded Hall as a contributor, but matched Mickens' DNA profile. (JA 29-30).

Other evidence showed that Mickens was seen acting suspiciously in the area near the riverside location at about the same time as Hall last was seen alive. Two of Raheem's friends left the party at the Towers Apartments at approximately 8:00 p.m. and sat for a while in a park adjacent to the apartments and the riverside. They saw Mickens hiding in the bushes, looking at them. (JA 21-22; Tr. 5/26/93, p. 605).

The prosecution also presented the testimony of Tyrone Brister, who had shared a holding cell with Mickens in March of 1993.[2] In discussing with each other why they were in custody, Mickens stated: "They said I stabbed somebody 140 something times in the head," and then, in a low voice, said, "Which I did." (JA 26). Mickens also related to Brister that the police had accused him of sodomizing his victim and stealing his sneakers. Again Mickens lowered his voice and said, "which I did." (*Id.*).

Mickens was tried before a jury in the Newport News Circuit Court on May 24-June 2, 1993, on indictments charging the capital murder of Timothy Hall in the commission of attempted forcible sodomy and a separate

[2] Brister was not a typical "cell mate" witness. He had been incarcerated briefly, released in March 1993, and was not subject to receiving any benefit for his testimony. He contacted the prosecutor the night before Mickens' trial started. (Tr. 6/1/93, p. 681). Brister reported that Mickens acknowledged killing *two* people. (JA 24-25). Prior to his testimony, the trial judge and prosecutor instructed Brister not to mention the second murder. (JA 25; Tr. 6/1/93, p. 703).

charge of attempted forcible sodomy. The Commonwealth presented the evidence outlined above. For the defense, Catherine Mickens, petitioner's mother, testified generally that Mickens always arrived home before dark. (JA 42). Mickens testified that he was at home every night by 9:00 p.m. (JA 44). Mickens specifically denied killing, or even knowing, Tim Hall. (JA 44-45, 47).

The jury convicted Mickens of both charges. (Tr. 6/3/93, p. 999). In a separate capital sentencing proceeding on June 4, 1993, the prosecution presented evidence of Mickens' prior convictions, parole violations, and the testimony of several victims of Mickens' prior crimes. (Tr. 6/4/93, pp. 1039-1059). The defense presented character evidence from a family friend and Mickens' aunt. (Tr. 6/4/93, pp. 1059-1066). Mickens' mother and sister testified about his upbringing. (Tr. 6/4/93, pp. 1067-1079). Mickens addressed the jury, repeated his denial of involvement in these crimes, and expressed sympathy for Hall's family. (Tr. 6/4/93, pp. 1089-1091). On June 7, 1993, the jury sentenced Mickens to death, finding both the future dangerousness and vileness aggravating factors. (Tr. 6/7/93, pp. 1144-1145).

The Virginia Supreme Court affirmed the convictions and death sentence on direct appeal. *Mickens v. Commonwealth*, 442 S.E.2d 678 (Va. 1994) (*Mickens I*). This Court, however, remanded the case for reconsideration following the decision in *Simmons v. South Carolina*, 512 U.S. 154 (1994), *see Mickens v. Virginia*, 513 U.S. 922 (1994), and the Virginia Supreme Court ordered a new sentencing hearing. *Mickens v. Commonwealth*, 457 S.E.2d 9 (Va. 1995) (*Mickens II*).

III. The Second Sentencing

A second jury was selected for a new sentencing hearing held February 5-8, 1996. The Commonwealth again presented the evidence concerning the murder, Mickens' parole history, and prior felony convictions: attempted grand larceny from the person in 1973; sodomy, robbery and grand larceny in 1974; and sodomy and robbery in 1980. (JA 87-88, 91-92). Charles Siron, one of the sodomy victims, testified that Mickens assaulted him in the Newport News City Jail in 1974, by putting a razor blade to his throat at night while he was sleeping, and forcing him into a shower area where he sodomized him. (JA 88-89). Ruby Bunn, a school teacher and one of the robbery victims, described how Mickens came into her second grade classroom, demanded her pocketbook and held a knife a few inches from a child's head while she gave Mickens her money. (JA 90-91).

Mickens again presented the testimony of his mother about his upbringing. (Tr. 2/7/96, pp. 454-458). However, this time counsel also took advantage of the fact that the second jury would be told of Mickens' parole ineligibility: counsel presented the testimony of Darius Robinson, an employee of the Virginia Department of Corrections, who described the living conditions Mickens would experience if sentenced to life imprisonment without parole, and Jacquelyn Brown, Mickens' prison counselor, who testified that Mickens had adjusted to confinement. (JA

92-96; Tr. 2/7/96, pp. 452-454).[3] The jury found both statutory aggravating factors and sentenced Mickens to death. After considering a probation report and other evidence presented during a post-sentencing hearing on March 29, 1996, the trial court imposed the sentence fixed by the jury. (JA 99-102).

IV. The Second Appeal and Habeas Corpus Proceedings

On appeal, the Virginia Supreme Court upheld Mickens' death sentence, *Mickens v. Commonwealth*, 478 S.E.2d 302 (Va. 1996) (*Mickens III*), and this Court denied certiorari on June 9, 1997. *Mickens v. Virginia*, 520 U.S. 1269 (1997). On November 7, 1996, the Newport News Circuit Court appointed counsel to represent Mickens for his state court habeas corpus proceeding. *See* Va. Code § 19.2-163.7. (JA 133). A habeas corpus petition was filed in the Virginia Supreme Court on August 7, 1997, and dismissed on December 15, 1997. (JA 126). Mickens did not raise any allegation of a conflict of interest. (JA 103-123).

V. The Federal Habeas Corpus Proceedings

On June 25, 1998, Mickens filed a federal habeas corpus petition in the United States District Court in Richmond and asserted for the first time that one of his two trial attorneys, Bryan Saunders, had had a conflict of

[3] Petitioner refers to the mitigation evidence as "scant" (Pet. Brief at 5), but never has identified any additional mitigation evidence.

interest because he previously had represented Tim Hall. The district court conducted an evidentiary hearing on January 13, 1999, which revealed the following:

Tim Hall's mother swore out an assault and battery complaint against her son on February 21, 1992, alleging that Hall grabbed her and shoved her to the floor in their home. (JA 393, 394). Approximately three weeks later, Hall was charged with possession of a concealed weapon after a policeman searched Hall's car pursuant to a traffic stop and discovered a serrated bread knife wrapped in newspaper. (JA 391, 392). A juvenile detention hearing was held on March 20, 1992, and Substitute Juvenile Court Judge Paul Criver appointed Bryan Saunders to represent Hall for both charges. (JA 396). The hearing was continued until April 3, 1992. (*Id.*).

Between March 20 and March 28, 1992, Hall met with Saunders one time, at Saunders' law office, for fifteen to thirty minutes. (JA 189). Saunders spoke with Hall only about the two charges. (JA 234-237). He learned that Hall's mother would not be pursuing the assault charge. (JA 222). He previously had determined that inadequacies in the police probable cause statement provided a legal defense to the "concealed weapon" charge. (JA 190, 221-222).

Unbeknownst to Saunders, on Friday, April 3, the date scheduled for Hall's detention hearing, Juvenile Court Judge Aundria Foster made an entry in the juvenile court's docket sheet, stating: "Remove from docket Def. deceased." (JA 390). When Saunders arrived for the hearing, he was told by someone outside of court that Hall was dead and the charges dismissed. (JA 143, 188).

Mickens was arrested on Saturday, April 4, 1992. On Monday, April 6, 1992, Juvenile Court Judge Foster appointed Saunders and Warren Keeling to represent Mickens. (JA 2). Judge Foster also conducted the preliminary hearing on July 17, 1992. Saunders successfully persuaded Judge Foster that no probable cause existed for two charges – abduction and robbery – and those charges thus were not certified to the circuit court for trial. (JA 254-255). Saunders and Keeling represented Mickens in the juvenile court proceedings, the 1993 trial, the 1996 resentencing, and both direct appeals.

An article published in a Newport News newspaper shortly after Hall's murder contained interviews with several of Hall's friends. One friend speculated that Hall might have been a homosexual prostitute, but the same article contradicted that assertion. (JA 397-398). The article described Hall's assault charge as based on an incident where Hall pushed his mother during an argument. (JA 398). Hall's friends also reported that the police had "picked him up" for carrying a concealed weapon. (*Id.*). The article referenced the fact that Hall had a social worker and was living with the Gordon family at the time of his death. (*Id.*).

Saunders' co-counsel, Keeling, was lead counsel for sentencing. (JA 157-158, 172-173, 183). He read the newspaper article and knew about Hall's juvenile charges and the speculation about his prostitution. Keeling investigated but found no evidence to indicate that Hall was a prostitute. (JA 162-164, 168-169, 173-177, 179). Saunders reviewed police reports concerning the early investigation of Hall's murder and noted several instances where friends and associates of Hall had provided information

about Hall's activities before his death and leads concerning individuals who might have harmed Hall. (JA 205-206, 207, 424, 426-427). Saunders could not recall in the 1999 evidentiary hearing all the details of the investigations he had conducted in 1992 concerning these "leads." (JA 207, 209-210, 229). Mickens offered no evidence during the evidentiary hearing to show that Hall had been a homosexual prostitute, that any additional "negative information" about Hall existed, or that any of the "leads" could be confirmed.[4] Mickens did not testify.

The district court found that Mickens had failed to demonstrate an actual conflict of interest or any adverse effect resulting from Saunders' prior representation of Hall. *Mickens v. Greene*, 74 F.Supp.2d 586, 615 (E.D. Va. 1999). (JA 309). First, the district court found that "Mickens has failed to demonstrate a correlation, much less a substantial and particular relationship, between Saunders' representation of Hall for assault and possession of a concealed weapon and his representation of Mickens on attempted forcible sodomy and capital murder charges." (JA 289). "Saunders' representation of Hall was very limited in scope and duration." (JA 288). The

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[4] The district court granted Mickens' discovery of Hall's juvenile files maintained by the social services agency and provided funding for an investigator to assist in developing the factual support for a conflict of interest claim. (JA 126-127, 130-131, 139-140, 256-257). In responding to the Warden's motion to dismiss the federal habeas petition, Mickens offered an affidavit from his investigator containing hearsay to the effect that individuals in Hall's neighborhood reported rumors of Hall's supposed "prostitution." (JA 137-138). However, no evidence to that effect was presented in the federal hearing.

representation of Hall did not involve the same subject matter as the charges facing Mickens and did not involve the same criminal transactions, events or witnesses. (*Id.*).

Second, the district court found as a matter of fact that Saunders' brief contacts with Hall had not produced information from the attorney-client relationship that had any relationship to Mickens' case. "[T]he record here confirms that Saunders did not learn any confidential information from Hall that was relevant to Mickens' defense either on the merits or at sentencing." (JA 291). Saunders had obtained knowledge of Hall's juvenile charges, but that information simply was not relevant to Mickens' defense because of Mickens' testimony. (JA 292).

Third, the district court disapproved of Saunders' failure to appreciate the ethical issues posed in these circumstances but, after hearing the testimony and considering petitioner's evidence, found that Mickens failed to establish that Saunders possessed any personal interest in concealing the alleged ethical conflict in representing Mickens. "[T]he evidence shows that, regrettably, Saunders never struggled with the ethical issues envisioned by Mickens." (JA 290). However, "the Court is unconvinced that . . . selfish 'loyalties or interests' existed, much less motivated Saunders' silence" about the prior representation of Hall. (JA 304).

Fourth, the district court carefully considered and rejected Mickens' allegations of an "adverse effect": it found that a "consent defense" was an "implausible alternative theory" foreclosed by the evidence, including

choke marks found on the victim's neck, blood stains on Hall's thighs, the 143 stab wounds, and Mickens' own insistence that he did not know Hall and had no involvement in these crimes. (JA 293-294). "Saunders discarded consent as a strategy not because of any loyalty to Hall, but because neither the facts nor Mickens' testimony was compatible with such a strategy." (*Id.*).

The district court further determined that using "negative information" about Hall at sentencing, based on a premise that it would mitigate the severity of a capital murder, was inconsistent with Mickens' own statements of innocence and sympathy and would have appeared disingenuous. (JA 295). The court found that, despite "diligent investigation by federal habeas counsel," Mickens had failed to uncover any evidence that Hall was a male prostitute. (JA 295). It found that such evidence would have been useful only in connection with the unavailable consent defense, and "the propensity of that approach to backfire made it an unreasonable alternate strategy or tactic at sentencing." (JA 295). The Court noted that even if such "negative information" existed and could be considered as offering a plausible strategy, it was Mickens' second lawyer, Keeling, and not Saunders, who was in charge of preparing for sentencing and Keeling not only was aware of Hall's juvenile charges and other circumstances of his life from a newspaper report, but did not consider any of that information relevant. (JA 296).

The court found that Saunders had not engaged in extensive plea negotiations because the Commonwealth's Attorney had rejected any plea agreement for a sentence less than death. (JA 296-297). The court determined that

using information about Hall's juvenile charge of assaulting his mother to "rebut" her 1996 victim impact statement containing assertions of grief would have been inconsistent with Mickens' statements of sympathy towards Hall's family and, in any event, not a viable tactic in the context of Virginia's sentencing process. (JA 297-299). Mickens' allegations that Saunders conducted a deficient investigation into leads about other possible suspects were rejected by the district court because they lacked any connection to the alleged actual conflict. "Mickens may carry this burden by showing that pursuit of these leads was inherently in conflict with Saunders' other loyalties or interests or by other probative evidence that he did not pursue the leads because of those interests. This he has failed to do." (JA 303).

Finally, the district court determined that the state juvenile court judge had the "capacity to connect" Mickens' charge with the deceased defendant, and that the "heinous nature of the crime and the publicity it received" made it unlikely that the connection would escape notice. (JA 307). Because Mickens was charged with a capital crime, the district court deemed Juvenile Court Judge Foster "no doubt aware" that Mickens might need to counter victim impact evidence. (JA 308). The district court thus concluded that this prospect constituted under *Wood v. Georgia*, 450 U.S. 261 (1981), a "potential conflict" that Judge Foster should have recognized when she appointed Saunders. (JA 307-308). The district court, however, did not read *Wood* as requiring an automatic reversal. Rather, the federal evidentiary hearing had clarified the fact that the possible conflict of interest "never ripened into an actual conflict nor was Saunders'

advocacy impaired." (JA 309). In the absence of an actual conflict adversely affecting Saunders' representation, the district court concluded that Mickens had failed to prove that the alleged conflict "worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions," and therefore he could not demonstrate "prejudice" from his state court default.[5] (JA 309).

A divided Fourth Circuit panel disagreed with the district court's determination that no actual conflict had been shown. *Mickens v. Taylor*, 227 F.3d 203 (4th Cir. 2000). (JA 318-354). The panel majority found an actual conflict of interest from what it divined as Saunders' personal interest in concealing the previous Hall representation. (JA 336). Additionally, the panel majority asserted that the Hall representation impaired Saunders' ability to investigate Hall's background and a possible "consent" defense. (JA 338-341). The panel majority believed that *Wood v. Georgia* required "reversal" if: (1) the trial court failed to inquire even though it knew or reasonably should have known of an "apparent conflict;" (2) the defendant did not waive conflict-free counsel; and (3) an actual conflict of interest existed. (JA 328).

The Fourth Circuit granted the Warden's petition for rehearing *en banc* and in a 7-3 decision affirmed the district court's denial of habeas corpus relief. *Mickens v.*

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[5] It is uncontested that Mickens' conflict claims were defaulted because they never were raised in state court. (JA 280). The district court found that the confidential nature of Saunders' juvenile court representation of Hall provided "cause" for the failure to raise the claims in state court. (JA 280-283).

Taylor, 240 F.3d 348 (4th Cir. 2001) (*en banc*). (JA 355-389). The majority concluded that *Wood v. Georgia* did not change the rule of *Cuyler v. Sullivan*, 446 U.S. 335 (1980), requiring a petitioner to demonstrate that an actual conflict adversely affected his attorney's representation when no objection to the representation was raised at trial. (JA 371-372). Because Mickens had not demonstrated that the alleged conflict adversely affected Saunders' representation, the *en banc* majority affirmed the denial of federal habeas corpus relief. (JA 372-377). The court specifically declined to decide whether the juvenile court judge who appointed Saunders knew or should have known of a potential conflict of interest because of Saunders' previous representation of Hall (JA 366), and also specifically declined to reach Mickens' argument that he had established an actual conflict. (JA 372).

SUMMARY OF ARGUMENT

Wood v. Georgia did not alter existing precedent that required a petitioner to demonstrate a Sixth Amendment violation by proof of an actual conflict that adversely affected counsel's performance. The Court's reference to "actual conflict" in the *Wood* remand order necessarily included the meaning that term had been given in *Cuyler v. Sullivan* less than a year before. The Court discussed the "actual conflict" in *Wood* in terms of a conflict that adversely affected the representation. Mickens' argument that *Wood* silently overruled or otherwise altered in any way *Sullivan*'s statement of the Sixth Amendment standard simply by omitting in the remand order the words,

"that adversely affected counsel's representation," cannot be defended by reference to *Wood*.

The district court conducted a thorough evidentiary hearing and made findings of fact that the two representations were entirely unrelated, Hall's juvenile charges produced no confidences that could be relevant to Mickens' defense, and Saunders in fact recognized no ethical conflict that would have created a conflicting personal interest. The district court's findings, which no judge of the court below even challenged, cannot be deemed clearly erroneous and are binding in this case. The *en banc* decision of the Fourth Circuit correctly held *Sullivan* and *Wood* to require a showing of actual conflict and adverse effect, and that Court correctly rejected Mickens' claims on the strength of the district court's findings because petitioner failed to show that the Hall representation had any effect on Mickens' case.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY HELD THAT A FEDERAL HABEAS CORPUS PETITIONER MUST SHOW AN ACTUAL CONFLICT OF INTEREST AND AN ADVERSE EFFECT TO ESTABLISH A SIXTH AMENDMENT VIOLATION WHERE A TRIAL COURT FAILS TO INQUIRE INTO A POTENTIAL CONFLICT OF INTEREST ABOUT WHICH IT REASONABLY SHOULD HAVE KNOWN.

The question presented in this case must be answered in the context of a prisoner seeking to void a presumptively valid state court final judgment in a federal habeas

corpus action based upon a defaulted claim of trial court error. Two courts now have determined that the conflict of interest Mickens alleged had no effect on the fairness of Mickens' trial or the reliability of his convictions. Settled precedent forecloses federal court review of Mickens' defaulted allegation absent a demonstration of both cause for his default and actual prejudice flowing therefrom. *See Gray v. Netherland*, 518 U.S. 152, 161-162 (1996). Even for preserved claims, a federal habeas petitioner must demonstrate that an interference with the right to counsel had some effect on the judgment, *see Strickland v. Washington*, 466 U.S. 668, 691 (1984), *United States v. Morrison*, 449 U.S. 361, 364-365 (1981), and in conflict cases this means showing that counsel "actively represented conflicting interests" before "prejudice" will be presumed. *Sullivan*, 446 U.S. at 350. *Wood v. Georgia* provides no reason for this Court to abandon precedent and award Mickens habeas corpus relief on a defaulted claim without having demonstrated any "prejudice," or to find a Sixth Amendment violation in the absence of any effect on the lawyer's representation or the state court judgment.

In *Wood*, on direct review of petitioners' probation revocation, this Court identified circumstances in the record which strongly suggested that petitioners' counsel had a conflict of interest. The attorney "may not have pursued [petitioners'] interests single-mindedly," but, because the parties had not briefed, argued or developed the record on the issue, the Court could not be "sure whether counsel was influenced in his basic strategic decisions by the interests of the employer who hired him." 450 U.S. at 271-272. The trial court had sufficient

notice of an "apparent" conflict but had failed to inquire. *Id.* at 272. This Court ordered the case returned to the state trial court to conduct a hearing: "If the court finds that an actual conflict of interest existed at that time, and that there was no valid waiver of the right to independent counsel, it must hold a new revocation hearing that is untainted by a legal representative serving conflicting interests." *Id.* at 273-274.

Solely on the basis of this statement, Mickens argues that *Wood* changed the standard governing conflict claims. He asserts that the state juvenile court judge who appointed counsel should have initiated an inquiry into the possibility of a conflict of interest because of Saunders' previous representation of Hall. Under Mickens' view of *Wood*, the absence of such an inquiry means that he may obtain federal habeas corpus relief by showing an "actual conflict" without regard to whether it had any effect whatsoever on counsel's representation.

Mickens' argument, however, rests on a fundamental misunderstanding of this Court's Sixth Amendment jurisprudence. At the time *Wood* was decided, this Court already had established certain well-defined requirements for a valid Sixth Amendment conflict of interest claim. Since the direct appeal decision in *Glasser v. United States*, 315 U.S. 60 (1942), it has been settled that the Sixth Amendment right to the effective assistance of counsel contemplates the assistance of a lawyer who is not burdened with conflicting interests. *Id.* at 70. At the same time, *Glasser* also clearly demonstrated that joint representation was not a per se violation of the Sixth Amendment right to counsel. The district court had appointed

Glasser's retained counsel to serve as counsel for a codefendant, Kretske, despite Glasser's objection and his attorney's warning of a possible conflict of interest. At the joint trial for conspiracy, counsel failed to cross-examine a prosecution witness who implicated Kretske, but not Glasser, and failed to object to arguably inadmissible testimony linking Glasser to the conspiracy. These failures "luminate[d] the cross-purposes under which [counsel] was laboring," *id.* at 73, and demonstrated that counsel's "struggle to serve two masters cannot seriously be doubted." *Id.* at 75. Having demonstrated the damaging conflicting interests, Glasser was not obligated to prove that the conflict prejudiced his defense: "The right to have the assistance of counsel is too fundamental and absolute to allow courts to engage in nice calculations as to the amount of prejudice arising from its denial." *Id.* at 76. Kretske, on the other hand, was not entitled to relief because he had not demonstrated how the denial of Glasser's right to counsel had prejudiced him. *Id.* at 76-77.

In *Holloway v. Arkansas*, 435 U.S. 475 (1978), another direct appeal case, the Court reaffirmed the view that joint representation did not presumptively establish constitutional error.[6] A public defender had been appointed to represent three codefendants who were tried together. The attorney unsuccessfully moved the trial court to

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[6] "One principle applicable here emerges from *Glasser* without ambiguity. Requiring or permitting a single attorney to represent codefendants . . . is not per se violative of constitutional guarantees of effective assistance of counsel." *Holloway*, 435 U.S. at 482.

appoint separate counsel for each defendant because his confidential communications with the men indicated a real risk of conflicting interests. The state court also denied a similar motion renewed on the day of trial, after each defendant indicated his desire to testify and after counsel represented that his knowledge of confidences removed his ability to question them. *Id.* at 477-478. This Court held that the trial court's ruling denied the defendants "the guarantee of assistance of counsel." *Id.* at 484. The decision acknowledged that lower courts since *Glasser* had "differed on how strong a showing of conflict must be made, or how certain the reviewing court must be that the asserted conflict existed," and had disagreed concerning "the scope and nature of the affirmative duty of the trial judge," but *Holloway* resolved neither issue. *Id.* at 483. Instead, this Court relied upon trial counsel's representations because the attorney was "in the best position professionally and ethically to determine when a conflict of interest exists or will probably develop," and had acted on his "obligation, upon discovering a conflict of interests, to advise the court at once of the problem." *Id.* at 485-486. The Court refused to require the defendants to show "prejudice" in these circumstances and, relying on *Glasser*, expressly held that "whenever a trial court improperly requires joint representation over timely objection reversal is automatic." *Id.* at 488.[7]

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[7] Justice Powell's dissenting opinion took issue with the Court equating the trial court's failure to inquire with a finding of conflicting interests. 435 U.S. at 492-493. His dissent proposed following the rules developed in lower courts that required showing "some specific instance of prejudice, some real conflict of interest, resulting from a joint representation" before finding

Two years later, in *Cuyler v. Sullivan*, a federal habeas corpus case, the Court addressed the two issues expressly reserved in *Holloway*: "whether a state trial judge must inquire into the propriety of multiple representation even though no party lodges an objection," and "whether the mere possibility of a conflict of interest warrants the conclusion that the defendant was deprived of his right to counsel." 446 U.S. at 345. The Court in *Sullivan* decided that, "[a]bsent special circumstances," the Sixth Amendment does not require a trial court to initiate an inquiry into possible conflicts simply because of multiple representation. "Unless the trial court knows or reasonably should know that a *particular* conflict exists, the court need not initiate an inquiry." *Id.* at 346-347 (emphasis added).

Resolving the second question in *Sullivan* produced the Court's first explicit discussion of the concept of "actual conflict" as it now is used in the context of Sixth Amendment claims.[8] *Sullivan* held that "the possibility of

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a Sixth Amendment violation. *Id.* at 494 n.3, *quoting United States v. Carrigan*, 543 F.2d 1053, 1055-1056 (2d Cir. 1976). If a trial court failed to conduct an inquiry after a timely objection, the dissent recommended shifting the burden of proof on the issue of "prejudice" to the prosecution. *Id.* at 495.

[8] The words "actual conflict" appeared in *Holloway*, 435 U.S. at 481, describing the state court's rejection of the defendants' claim. *See Holloway v. State*, 539 S.W.2d 435, 439 (1976) (describing "majority rule" as requiring some "evidence of an actual conflict of interest or evidence pointing to a substantial possibility of a conflict of interest" before joint representation is reversible error). *Sullivan* noted that a "substantial majority" of the federal courts of appeals at that time required a defendant to establish a Sixth Amendment

conflict is insufficient to impugn a criminal conviction." *Id.* at 350. To distinguish clearly the "actual conflict" that would violate the Sixth Amendment from the "possible conflict" that would not, the Court purposefully and unambiguously coupled "conflict" and "effect."

> In order to establish a violation of the Sixth Amendment, a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance.

Id. at 348. The Court referred interchangeably to an "actual conflict of interest," *id.* at 348, n.14, "a conflict of

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violation by identifying an "actual conflict of interest," 446 U.S. 348 n.14, and the decisions cited also had defined "actual conflict" in terms of *affecting* the representation of counsel or prejudicing the defense. *See United States v. Lovano*, 420 F.2d 769, 773 (2d Cir.) ("some specific instance of prejudice, real conflict of interest, resulting from a joint representation must be shown to exist"), *cert. denied*, 397 U.S. 1071 (1970); *United States v. Atkinson*, 565 F.2d 1283, 1284-1285 (4th Cir. 1977) (adopting *Lovano*), *cert. denied*, 436 U.S. 944 (1978); *Foxworth v. Wainwright*, 516 F.2d 1072, 1077-1079 (5th Cir. 1975) (plausible defense foreclosed because of damage to co-defendants constituted actual substantial conflicts); *Thacker v. Bordenkircher*, 590 F.2d 640, 641-642 (6th Cir.) (defendants had consistent defenses and no actual conflict or prejudice), *cert. denied*, 442 U.S. 912 (1979); *United States v. Mandell*, 525 F.2d 671, 678 (7th Cir. 1975) ("There must be a showing of a conflict of interests based on the record and not on mere speculation"), *cert. denied*, 423 U.S. 1049 (1976); *United States v. Cox*, 580 F.2d 317, 323 (8th Cir. 1978) (possibility of another strategy was insufficient to establish actual conflict), *cert. denied*, 439 U.S. 1075 (1979); *United States v. Kutas*, 542 F.2d 527, 529 (9th Cir. 1976) (must show actual conflict prejudiced defense), *cert. denied*, 429 U.S. 1073 (1977); *Carrigan*, 543 F.2d at 1056 (in absence of inquiry by court, government bears burden on issue of prejudice).

interest [that] *actually affected* the adequacy of the representation," *id.* at 349 (emphasis added), and "actively represent[ing] conflicting interests." *Id.* at 350. Then, dispelling any doubt about the ruling, the definition of what constitutes an impermissible conflict was repeated in the closing paragraph: "In order to demonstrate a violation of his Sixth Amendment rights, a defendant must establish that an actual conflict of interest adversely affected his lawyer's performance." *Id.* at 350.

Significantly, *Sullivan*'s requirement that the alleged conflict be "actual" in terms of having manifested itself in some "adverse effect" before it could state a valid Sixth Amendment claim, certainly was within the body of precedent governing conflict claims. The Court had rejected the idea that multiple representation was presumptively unconstitutional in both *Glasser* and *Holloway*. *Glasser* had stressed the failures of counsel that had resulted from counsel's desire to protect Kretske's interests and which revealed the "struggle to serve two masters." 315 U.S. at 75. In *Holloway*, the Court recognized that *Glasser* had found actual impairments in the lawyer's performance in concluding that conflicting interests had been shown, 435 U.S. at 482, and the Court divided specifically on the need for a finding that a conflict had "prejudiced" or "hampered" Holloway's defense. *Id.* at 492-493, 496 (Powell, J., dissenting).

In *Sullivan*, the Court acknowledged that the requirement of actual conflict adversely affecting the representation was different from *Holloway*'s "automatic reversal" rule because *Holloway* "did not consider whether the alleged conflict actually existed." *Sullivan*, 446 U.S. at 345. *Sullivan*, however, did not overrule *Holloway*. Instead, the

Court took great care to confine *Holloway*'s "automatic reversal" rule to the particular factual circumstance of denying a defendant who objects to counsel's representation the *opportunity* to prove a conflict:

> [A] defendant who objects to multiple representation must have the opportunity to show that potential conflicts impermissibly imperil his right to a fair trial. But *unless the trial court fails to afford such an opportunity*, a reviewing court cannot presume that the possibility for conflict has resulted in ineffective assistance of counsel.

Id. at 348 (emphasis added).

Removing all doubt concerning the scope of *Holloway*, the Court *repeated* its definitional distinction of *Holloway*, *see Sullivan*, 446 U.S. at 348, making clear that the *general* rule is the overarching Sixth Amendment standard of actual conflict adversely affecting counsel's performance and that an *exception* to this general rule exists only for a defendant who raises an objection at trial. Mickens thus misstates *Sullivan* when he asserts that the Court defined the Sixth Amendment violation in terms of whether a "judicial duty to initiate an inquiry arises." (Pet. Brief at 27). The Court certainly acknowledged the duty of a trial court to inquire when it "knows or reasonably should know that a particular conflict exists," but the Court could not have made it any plainer that the Sixth Amendment violation turned on showing that an actual conflict adversely affected counsel's performance. 446 U.S. at 348 *and* 350.

At the same time, *Sullivan* ended any dispute over whether "prejudice," in the harmless error sense, needed

to be proved or disproved. Prejudice is presumed, as both *Glasser* and *Holloway* intended, but only after the petitioner "shows that a conflict of interest actually affected the adequacy of his representation."[9] 446 U.S. at 349.

Sullivan did not attempt to define fully the distinctive "actual conflict" that "adversely affected" a lawyer's representation beyond illustrating what was evident in prior cases. The obvious "struggle to serve two masters" identified in *Glasser*, 315 U.S. at 75, had "impaired the defense." *Sullivan*, 446 U.S. at 439. In *Dukes v. Warden*, 406 U.S. 250, 256 (1972), no "lapse in representation" warranting relief was shown when Dukes' attorney also represented two codefendants who shifted blame for the crimes to Dukes after he pleaded guilty. *See Sullivan*, 446 U.S. at 349. These contrasting examples served to make *Sullivan*'s point: a possible or hypothetical conflict of interest is made concrete – *actual* – by evidence demonstrating that in fact it adversely affected counsel's

[9] "Prejudice" is not a one-size-fits-all concept, but is given different meanings in different contexts. In *Glasser* and *Holloway*, the Court discussed "prejudice" in rejecting consideration of "harmless error." The "prejudice" that *Sullivan* presumed "is not quite the *per se* rule of prejudice" that exists for the outright denial, or prevention of the assistance, of counsel. *Strickland*, 466 U.S. at 692; *United States v. Cronic*, 466 U.S. 648, 659 and n.25 (1984). Mickens' conflict claim is a defaulted claim which, as the district court properly found, independently requires a showing of "prejudice" – that the errors in his trial "worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimension." *United States v. Frady*, 456 U.S. 152, 170 (1982); *Murray v. Carrier*, 477 U.S. 478, 494 (1986).

representation. Like the sound of the proverbial tree falling in the forest, the actual conflict cannot be known to exist without its discernable imprint, its adverse effect.

One week after *Sullivan* was announced, the Court granted certiorari in *Wood* to decide the constitutionality of imprisoning probationers who had failed to make installment payments on fines. *See Wood v. Georgia*, 446 U.S. 951 (1980) (order granting certiorari); *Wood*, 450 U.S. at 264 (identifying certiorari issue). After oral argument, however, the Court identified factual circumstances which strongly suggested the possibility that the employer and the attorney representing the petitioners might have orchestrated the petitioners' predicament simply as a way to create a test case for the employer on the constitutional issue. If the attorney "was serving the employer's interest in setting a precedent," there was a "clear possibility of conflict of interest." *Id.* at 267-268. The state's attorney repeatedly had brought the potential for conflict to the attention of the trial court, but the judge conducted no inquiry into the issue. *Wood*, 450 U.S. at 265 n.5, 273. The Court remanded the case to determine if an "actual conflict" existed. *Id.* at 273-274. *Wood*, however, never suggested that the Court was adopting any different meaning of "actual conflict" than had been set out a year earlier in *Sullivan*.

Mickens now insists that *Wood*'s specific reference to "actual conflict" in its remand order, without an additional and equally specific reference to "adverse effect," should be taken to mean that the Court intentionally uncoupled *Sullivan*'s deliberate link of conflict and

effect.[10] Mickens sees *Wood* as announcing a new Sixth Amendment standard to fill in an imagined gap in the Court's jurisprudence. Mickens reads *Wood* to hold that: conflict claims arise in "three separate circumstances" and each circumstance requires its own rule; no rule previously had been announced for *Wood*'s circumstances which lay somewhere between *Holloway* and *Sullivan*; and subdividing the *Sullivan* rule would satisfy Mickens' need for an intermediate rule. (Pet. Brief at 29-35). Borrowing from the Fourth Circuit dissenters, Mickens concludes that *Wood* announced a rule he has fashioned for relief in his own case:

> A defendant establishes a Sixth Amendment violation when there is no objection to counsel's representation, but the trial judge knew or reasonably should have known about an apparent conflict and conducted no inquiry, and the defendant shows an "actual conflict" without regard to an "adverse effect."

(Pet. Brief at 30). (JA 328).

[10] The Fourth Circuit, like other courts of appeals, has approached the task of applying *Sullivan* by defining and examining "actual conflict" and "adverse effect" as distinct concepts, while recognizing that *Sullivan* requires linking the "conflict" and "effect." *See, e.g., United States v. Tatum*, 943 F.2d 370, 375 (4th Cir. 1991); *United States v. Fahey*, 769 F.2d 829, 836 (1st Cir. 1985); *Lipson v. United States*, 233 F.3d 942, 946 (7th Cir. 2000); *United States v. Miskinis*, 966 F.2d 1263, 1268 (9th Cir. 1992); *United States v. Migliaccio*, 34 F.3d 1517, 1526 (10th Cir. 1994). "The two requirements, an actual conflict of interest resulting in an adverse effect on counsel's performance, are often intertwined, making the factual analyses of them overlap." *Tatum*, 943 F.2d at 375. *See also Stoia v. United States*, 109 F.3d 392, 397 (7th Cir. 1997).

Of course, the new constitutional doctrine Mickens discerns has no history before *Wood*, was never discussed in *Wood*, and has not been suggested by this Court since *Wood*. The Court's opinion certainly does not support the remarkable supposition that *Wood* intended to introduce a new variation in Sixth Amendment jurisprudence without briefing, argument or even discussion, and to do so through the subtle mechanism of omitting the words "adverse effect" from the remand order. Certainly *Wood* cannot be read to have silently overruled *Sullivan*'s plain and recent statement that a Sixth Amendment violation requires a showing of an actual conflict *adversely affecting* the representation.[11] As the *en banc* Fourth Circuit

[11] Mickens' extended discussion of why the rule he advocates would be a good idea simply fails to recognize the fact that *Sullivan* necessarily rejected the idea of granting presumptive "adverse effect" to habeas petitioners in Mickens' circumstances. *Sullivan* has not been overruled and Mickens' federal habeas action is not the place for the Court to announce new rules of law. *See Saffle v. Parks*, 494 U.S. 484, 487 (1990) (Court will not announce or apply new rule on collateral review); *Teague v. Lane*, 489 U.S. 288 (1989). Mickens' accusation of bad faith on the part of trial counsel as a reason to dispense with showing an "adverse effect" (Pet. Brief at 33-34) is wholly unwarranted and, moreover, a poor basis upon which to fashion constitutional principles. Saunders represented Mickens vigorously through preliminary hearing, the trial, and two appeals in the Virginia Supreme Court, including successfully eliminating robbery and abduction charges before Mickens' 1993 trial and winning Mickens a new sentencing hearing in 1995. The district court's dissatisfaction with some of Saunders' decisions does not alter the fact that the District Judge who saw and heard the witnesses found no actual conflict of interest or adverse effect.

accurately observed, "*Wood*'s terse instruction to the trial court on remand cannot bear the constitutional weight Mickens ascribes to it." (JA 372).

Indeed, *Wood*'s only comment on Sixth Amendment conflict precedent was a single mention of *Sullivan* in footnote 18, responding to a dissenting opinion which had criticized the majority for using *Sullivan* to assume "jurisdiction over a claim otherwise beyond its reach."

> Justice White's dissent states that we have gone beyond the recent decision in *Cuyler v. Sullivan*. Yet nothing in that case rules out the raising of a conflict-of-interest problem that is apparent in the record. Moreover, *Sullivan* mandates a reversal when the trial court has failed to make an inquiry even though it "knows or reasonably should know that a particular conflict exists."

Wood, 450 U.S. at 272 n.18. (citation omitted).[12] From this reference, Mickens infers an intent to create a separate rule of "actual conflict" without *any* effect in a situation where the trial court was on notice of a particular conflict. The Court's reference to "reversal," however, must be understood as authorizing the action the Court took in that case. On direct review, this Court vacated the underlying judgment of revocation to permit a judicial inquiry to determine the existence of a conflict this Court found to be "strongly suggest[ed]." *Id*. at 273.

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[12] *Wood* was not a Sixth Amendment case. *Wood*, 450 U.S. at 273 ("we base our decision in this case on due process grounds"). The employees possessed a due process right to counsel for the probation revocation hearing, which also included a right to conflict-free counsel. *Id*. at 271.

The Court explained the "apparent conflict" it identified in *Wood* just as it had explained "actual conflict" in *Sullivan* – by reference to various "indications" of *adverse effects*: the employer's failure to pay the employees' fines, 450 U.S. at 267; the attorney's failure at the revocation hearing to "dwell on the apparent bad faith of his own employer," *id*. at 268, n.14; the lack of protest by trial counsel to the amounts of fines imposed on indigent employees, *id*. at 267-268; and the effort to conceal even the name of the employer. *Id*. at 269, n.16. On the appellate record, the Court was unable to resolve the conflict issue it had identified, but the Court's concern with these "indications" manifesting conflicting interests allowed no uncertainty about what the state court was commanded to do on remand.

Mickens focuses on the bare words of *Wood*'s remand order yet overlooks the fact that the Court already had described the circumstances that would constitute a violation of the right to counsel in that case. If the differing goals of employer and employee disabled counsel from "pursu[ing] petitioners' interests single-mindedly," *id*. at 271-272, and if "counsel *was influenced in his basic strategic decisions by the interests of the employer who hired him*," *id*. at 272 (emphasis added), "the due process rights [to counsel] of petitioners were not respected at the revocation hearing, or at earlier stages of the proceedings below." *Id*. By focusing the inquiry on the *influence on counsel's representation*, *Wood* undeniably applied *Sullivan*'s requirement of an actual conflict adversely

affecting the representation.[13] The Fourth Circuit thus correctly ruled that the Court's reference to "actual conflict" in these circumstances necessarily also included the "adverse effect" inquiry.

This Court consistently has maintained *Sullivan*'s standard of actual conflict adversely affecting a lawyer's representation. *See, e.g., Strickland*, 466 U.S. at 692 (prejudice presumed only if defendant "demonstrates that counsel actively represented conflicting interests," and "an actual conflict of interest adversely affected his lawyer's performance"); *United States v. Cronic*, 466 U.S. at 661 n.28 (citing *Sullivan*, ineffectiveness presumed when counsel "actually represented conflicting interests"); *Smith v. Robbins*, 528 U.S. 259, 287 (2000) ("prejudice is presumed when counsel is burdened by an actual conflict of interest, although in such a case we do require the defendant to show that the conflict adversely affected his counsel's performance.").

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[13] It is possible to read *Wood* as implicitly finding an "actual conflict," as that term now often is defined, *i.e.*, one attorney actively representing the diverging interests of several clients, because the lawyer in *Wood* actively represented multiple clients and the Court identified potential areas where the parties' interests diverged. It also may be possible to read *Wood* as necessarily including an implied finding of "adverse effect" because the Court found ways that petitioners' lawyer's performance may have been "impaired." But the Court's instruction to the state court concerning the showing that would establish a violation of the right to counsel, was "whether counsel was influenced in his basic strategic decisions by the employer who hired him." This instruction linked the concepts of conflict and effect, just as *Sullivan* had contemplated.

In *Burger v. Kemp*, 483 U.S. 776 (1987), the Court expressly reaffirmed *Sullivan*'s linkage of "actual conflict" and "adverse effect" in the context of an alleged conflict from law partners representing codefendants in separate trials. The Court upheld the district court's findings that petitioner's attorney had not actively represented competing interests, *id.* at 783, and that petitioner had not demonstrated that an actual conflict adversely affected counsel's performance. *Id.* at 785. The inextricable linkage of conflict and effect is clear in the Court's decision: petitioner's alleged "actual conflict" was based on counsel's strategic decisions in the handling of his appeal. *Id.* at 784. The district court's finding that the lawyer had not been motivated by his partner's representation demonstrated that the possible conflicting interest had not affected his performance and no "actual conflict" existed. *Id.* at 784-785.

It is not mere chance that this Court's Sixth Amendment conflict of interest decisions in direct appeal cases look first to the issue of trial court error and that *Sullivan*, a habeas case, looks to the effect of the alleged actual conflicts. Review for trial court error, and actions taken to address such error as occurred in *Wood*, are essential appellate functions. *Sullivan* contemplates the possibility that trial court error in failing to inquire into possible conflict situations may go unnoticed until collateral proceedings, and concludes that it is not inappropriate to require the habeas petitioner to make the showing required by *Sullivan* to establish a Sixth Amendment violation before vacating a presumptively valid state court final judgment. "It has, of course, long been settled law that an error that may justify reversal on direct appeal

will not necessarily support a collateral attack on a final judgment." *Frady*, 456 U.S. at 165, *quoting*, *United States v. Addonizio*, 442 U.S. 178, 184 (1979). The Sixth Amendment's purpose in assuring fairness in the adversary criminal process, *Wheat v. United States*, 486 U.S. 153, 158 (1988), *Strickland*, 466 U.S. at 691-692, is preserved fully by the *Sullivan* rule.

II. THE DISTRICT COURT AND COURT OF APPEALS CORRECTLY APPLIED *SULLIVAN* IN REJECTING MICKENS' CLAIMS.

Mickens' argument in favor of finding a constitutional conflict of interest relies heavily on the immediate visceral impact of learning that a lawyer previously represented the victim of his current client.[14] This Court consistently has refused, however, to create categories of legal representations which would constitute per se conflicting interests prohibited by the Sixth Amendment and,

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[14] The factual circumstances presented by this case are by no means unique. *See, e.g., Crisp v. Duckworth*, 743 F.2d 580, 588 (7th Cir. 1984) (finding no conflict where defense counsel previously represented murder victim in unrelated criminal action), *cert. denied*, 469 U.S. 1226 (1985); *Kirkpatrick v. Butler*, 870 F.2d 276, 284 (5th Cir. 1989) (finding no conflict based on defense counsel's friendship with, and prior representation of, members of murder victim's family), *cert. denied*, 493 U.S. 1051 (1990); *Mosley v. Scully*, 908 F. Supp. 1120 (E.D. N.Y. 1995) (finding no actual conflict where counsel previously represented murder victim on unrelated charges); *Dixson v. Quarles*, 627 F. Supp. 50 (E.D. Mich.) (no actual conflict where defense counsel previously represented murder victim), *aff'd*, 781 F.3d 534 (6th Cir. 1985), *cert. denied*, 479 U.S. 935 (1986).

as discussed, *Sullivan* requires the showing of an actual conflict of interest adversely affecting counsel's performance.

Mickens relies on the particular instances of "actual conflict" found only by the two judges of the Fourth Circuit *panel* majority, but his argument primarily stresses the single claim that Saunders obtained confidential information about Hall's background which he could not use in Mickens' defense or to rebut family victim-impact testimony.[15] (Pet.

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[15] Judge Michael's opinion for the panel majority identified an "actual conflict" in the following ways: (1) Saunders possessed a residual duty to maintain Tim Hall's secrets and confidences even after the representation ended which allegedly conflicted with Mickens' interest in his lawyer pursuing a reasonable pre-trial investigation, including an investigation of Hall's character and background; (2) a member of Hall's family might offer "victim impact" testimony at sentencing, but Saunders' duty to preserve Hall's confidences prevented him from investigating the victim's relationships with his family; and (3) Saunders' failure to reveal the prior Hall representation to Mickens and the trial court constituted an ethical breach and Saunders' supposed personal interest in concealing his ethical lapse conflicted with Mickens' interest in conflict-free representation.

Concerning the last item, Mickens merely adopts the panel majority's theory of an "actual conflict" based on Saunders' alleged "ethical conflict" without separately arguing the point. The district court's specific and unchallenged factual findings, however, directly refuted the basic factual assertions underlying the theory because the district court found that Saunders never recognized any conflicting interests and never developed any personal interest in concealing the previous Hall representation. (JA 290-291, 304-305). The *en banc* Fourth Circuit correctly upheld the district court's findings that Saunders had not concealed his previous representation of Hall out of "a conflicting personal interest in remaining assigned to the case." (JA 376).

Brief at 46). According to Mickens, Saunders' duty to maintain Hall's confidences adversely affected his representation because evidence existed that could have been considered in formulating defense strategies based on "consent" or "negative information" about the victim. He argues that Saunders was prohibited ethically from making choices whether or not to investigate Hall's background and that this demonstrates sufficient impairment of the representation to constitute an "adverse effect."[16] (Pet. Brief at 47). Even assuming that Saunders ethically was prohibited from revealing or acting on the limited "confidential" information he received from his brief representation of Hall, *see Swidler & Berlin v. United States*, 524 U.S. 399 (1998) (duty to preserve confidences continues after the death of the client), Mickens never has demonstrated that Saunders and Keeling failed to make reasonable investigations, much less that they failed as a

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[16] The Sixth Amendment standard clearly is not defined by ethical rules that govern attorneys' professional conduct. *See Nix v. Whiteside*, 475 U.S. 157, 165 (1986) ("[B]reach of an ethical duty does not necessarily make out a denial of the Sixth Amendment guarantee of assistance of counsel"); *Strickland*, 466 U.S. at 668 (norms of practice are guides only). Ethical rules necessarily are forward-looking, meant to anticipate potential conflicts in advance. The prospective nature of such rules makes them helpful for a trial court's discretionary decision to disqualify counsel and avoid even potential conflicts, *see Wheat*, 486 U.S. at 160-161, but less useful in the retrospective assessment of harmful impact on counsel's representation. Thus, the Court should decline the invitation of petitioner's amici to abandon its precedents and delegate to the drafters of rules of professional conduct the authority to determine the reach of the Sixth Amendment.

result of Saunders' previous unrelated representation of Hall.

A. Saunders' Successive Representation Presented a Reduced Risk of "Actual Conflict."

The claims of a conflict of interest here involve only a successive representation. Saunders was appointed to represent Hall for juvenile court charges and that *representation* indisputably ended when the charges were dismissed. At that point in time, Saunders no longer had any ability to take any action for or against Hall's interests in that representation. Saunders never simultaneously *represented* Hall and Mickens. *See Burger*, 483 U.S. at 783 (any "overlap of counsel" from law partners representing codefendants "did not so infect [defense counsel's] representation as to constitute an active representation of competing interests"); *Mackall v. Commonwealth*, 372 S.E.2d 759, 765 (Va. 1988) (defendant's attorney previously represented prosecution witness for an unrelated matter; no conflict or effect because co-counsel cross-examined witness), *cert. denied*, 492 U.S. 925 (1989).

The opportunities for conflicting interests to arise in a successive representation of individuals who are not codefendants or charged with factually related offenses are far more limited than the risks associated with multiple representation of codefendants in one trial, *see, e.g., Glasser, Holloway*, and *Sullivan*, or the multiple representation of codefendants in separate trials, as in *Dukes* and *Burger*, or even *Wood*'s circumstances of an attorney representing the interests of a third party who is not charged

with an offense but is paying for, and perhaps controlling, the on-going representation of other defendants.[17] The absence of a concurrent representation simply reduces the opportunity for friction between conflicting interests.

B. Mickens Failed to Show That an Actual Conflict Adversely Affected Saunders' Performance.

The district court and Fourth Circuit rejected Mickens' claims of "adverse effect" because petitioner failed to identify plausible and viable alternative defense strategies available to Mickens that Saunders was prevented from pursuing. (JA 376-377).[18] The district court

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[17] The risks of shifting blame among codefendants, inconsistent defenses, and accounting for the relative strength or weakness of evidence against codefendants are not presented in Mickens' case and several circuit courts of appeal have recognized that an actual conflict of interest is less likely to arise in the circumstances of unrelated successive representations. *See United States v. Gambino*, 864 F.2d 1064, 1070 (3d Cir. 1988), *cert. denied*, 492 U.S. 906 (1989); *Mannhalt v. Reed*, 847 F.2d 576, 580 (9th Cir.), *cert. denied*, 488 U.S. 908 (1988); *Smith v. White*, 815 F.2d 1401, 1405 (11th Cir.), *cert. denied*, 484 U.S. 863 (1987); *Fahey*, 769 F.2d at 834.

[18] As Mickens acknowledges, the courts of appeals have adopted approaches to conflict claims after *Sullivan* that necessarily blend the actual conflict and adverse effect inquiry and, like the Fourth Circuit, require proof of alternative defense strategies that may have been obstructed by conflicting interests. (Pet. Brief at 37-38, n.57). *See Fahey*, 769 F.2d at 836 (defining "actual conflict" in terms of a showing of a "plausible alternative defense strategy or tactic" that has "sufficient substance to be a viable alternative," but is "inherently in conflict" with other interests or "not undertaken due to the

conducted a thorough evidentiary hearing and made specific factual findings and credibility determinations fully supported by the evidence. The *en banc* Fourth Circuit unambiguously upheld the district court's findings of fact in ruling that no "adverse effect" had been shown. (JA 372-377). Mickens cannot substitute speculation for "these heavily fact-based rulings," *see Burger*, 483 U.S. at 785, and the district court's findings of fact concerning Mickens' allegations of an "actual conflict" cannot be ignored, or "assumed" away, because Mickens finds them inconvenient to his theory of the case. They are binding on this Court and may be set aside only if "clearly

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attorney's other loyalties or interests"); *Winkler v. Keane*, 7 F.3d 304, 309 (2d Cir. 1993) (adopting *Fahey* alternative strategy/ "actual conflict" formulation to test "adverse effect"), *cert. denied*, 511 U.S. 1022 (1994); *Gambino*, 864 F.2d at 1070-1071 ("Clearly, a defendant who establishes that his attorney rejected a plausible defense because it conflicted with the interests of another client establishes not only an actual conflict but the adverse effects of it."); *Perrillo v. Johnson*, 79 F.3d 441, 449 (5th Cir. 1996) (adopting alternative defense standard for "adverse effect"); *United States v. Mays*, 77 F.3d 906, 908 (6th Cir. 1996) (conflict shown by instances in the record where attorney chose between alternative courses of action); *Stoia*, 109 F.3d at 395 (conflict has "adverse effect" if "there is a reasonable likelihood that counsel's performance somehow would have been different"); *Miskinis*, 966 F.2d at 1268 (effect on performance "likely"); *Migliaccio*, 34 F.3d at 1526 ("adverse effect" if "seemingly valid or genuine alternative strategy" conflicted with other interests); *Freund v. Butterworth*, 165 F.3d 839, 860 (11th Cir.) ("adverse effect" shown if plausible and reasonable strategy not pursued because linked to conflict), *cert. denied*, 528 U.S. 817 (1999).

erroneous."[19] F. R. Civ. P. Rule 52(a). *See Anderson v. City of Bessemer City*, 470 U.S. 564, 573 (1985).

1. Consent Defense

Mickens' theory of "consent" is based on several observations he makes concerning the crime scene, the condition of Hall's body, and a newspaper article which contained speculation that Hall might have been a homosexual prostitute and a description of the riverside location as a hang-out for vagrants, winos, street people, drug addicts, prostitutes and runaways.[20] (JA 397-398).

[19] Mickens' repeated complaint that it is not appropriate to rely on the "record" created by "conflicted" counsel cannot circumvent the district judge's findings. Mickens cannot merely state that he has shown a conflict and then attack the record, especially in the face of district court findings to the contrary. More significantly, the "record" relied upon by the district court is not limited to the trial record. It also includes the federal evidentiary hearing where Mickens had the opportunity to develop facts in support of his allegations, but failed to do so.

[20] As the district court set them out, "Mickens points to the following facts that made consent a plausible defense strategy: (a) there were no 'defensive' stab wounds; (b) there was no evidence that Hall was forced to the secluded area where he was found; (c) there were rumors that Hall was a male prostitute and that the area where Hall's body was found was a known gathering place for homosexuals; (d) there was no blood mixed with Mickens' semen stain on the mattress; and, (e) the mattress where Hall's body was found had been used for sexual activity in the past." (JA 292-293). Mickens argues that Hall must have accompanied his killer voluntarily to the river in order to engage in consensual sex because the only access to the location was down a steep embankment and the killer could not have forced Hall down a precarious hill. In addition to the obvious point that an armed assailant probably could have forced Hall

Mickens postulates the following outlandish scenario: Hall voluntarily accompanied someone to the isolated location (Pet. Brief at 9-10) to have "consensual sex" (*id.* at 45) which "ended unsatisfyingly," then "something . . . happened" (*id.* at 49 n.74) – "assaultive behavior, sexual mockery, or other forms of discreditable activity by Hall" (*id.* at 14 n.28) – that "incited [someone] to homicidal fury." (*Id.* at 49 n.74). Someone then choked Hall and "straddl[ed] Hall's body," "pinioning Hall while stabbing him." (*Id.*).[21]

Although the district court granted Mickens an evidentiary hearing, Mickens failed to show that any witness, or other competent and admissible evidence, ever had existed to prove the supposed "prostitution."[22] (JA

down the bank, the testimony at the evidentiary hearing and a diagram of the area demonstrate conclusively that the murder location was easily assessable by way of a set of stairs leading down to the river and only one block from Hall's apartment and the murder scene. (JA 8, 428).

[21] The evidence established that sodomy, and more specifically anal sodomy, undoubtedly was the goal of Hall's assailant: Hall's body was face down; his trousers and underwear removed and cast aside; his legs spread apart; a lubricant found on Hall's buttocks near his anus; and, pubic hairs with roots, suggesting that they had been removed by rubbing or other friction, found on Hall's buttocks. Bloody transfer stains on the outside of Hall's thighs indicated that the stabbing occurred before or during the sexual assault. The absence of any injury to the boy's anus contradicts any suggestion that the act intended ever was completed.

[22] Trial counsel could not rely on rumors, much less hearsay reports of rumors in newspaper articles, to establish Hall's supposed "reputation." *See* Va. Code § 18.2-67.7. *See also Hoke v. Commonwealth*, 377 S.E.2d 595, 599 (Va. 1989) ("rape

295, 303). Hall's juvenile charges did "not suggest that he was a prostitute, much less that he consented to have sex with Mickens" (JA 288), and Saunders' representation of Hall simply was not related to Mickens' charges or a consent defense. (JA 289, 291). The district court found that the information available to counsel "foreclosed presentation of consent as a plausible defense." (JA 293). Saunders knew from police reports that Hall occasionally visited the riverside; Hall's neck was bruised by a choke hold; the bloody transfer stains on the back of his thighs put the stabbing before or during a sexual assault; Hall was stabbed 143 times from behind; and, "most importantly," Mickens claimed that he did not kill or even know Hall.[23] (JA 293). Both attorneys testified without reservation that in the absence of the defendant's

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shield" statute bars "evidence of general reputation or opinion of the unchaste character of the complaining witness in all circumstances"), *cert. denied*, 491 U.S. 910 (1989); *Winfield v. Commonwealth*, 301 S.E.2d 15, 20-21 (Va. 1983) (statute reversed common law rule permitting opinion reputation evidence which "has very little probative weight"; evidence showing rape victim had reputation of prostitution based on specific acts with third parties was inadmissible at common law and under statute).

[23] Mickens cannot avoid his own testimony by hinting that "unconflicted" counsel might have persuaded him to testify differently. Saunders and Keeling reasonably relied on Mickens' denials in formulating his defense, *see Strickland*, 466 U.S. at 691, and Mickens should not be heard to suggest that counsel should have advocated that Mickens perjure himself. In any event, Mickens never testified in the federal hearing, and there is no factual basis to indicate his versions of events ever would change.

testimony consent simply was not a plausible or viable defense. (JA 165, 182, 211-212, 245).[24]

Inexplicably, Mickens fails even to mention that independent co-counsel, Warren Keeling, had investigated the rumors about Hall that were reported in the paper. (JA 173-175). Keeling took the lead at sentencing and investigated the case independently of Saunders. Specifically, Keeling spoke to Bernard Gordon, went to the Towers neighborhood on several occasions, and spoke to others about Hall, but was unable to confirm rumors of Hall's "prostitution." (JA 173-175, 176). Thus, with respect to the claim of failure to investigate Hall, *Saunders'* prior representation is irrelevant because Keeling independently investigated the case, and Mickens never has alleged that Keeling possessed any conflicting interests. (JA 161, 172-173, 183, 227). The district judge saw and heard the witnesses testify and found that "Saunders discarded consent as a strategy not because of any loyalty to Hall,

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[24] The defense of consent must be advanced by evidence. *Smith v. Commonwealth*, 248 S.E.2d 135, 142 (Va. 1978), *cert. denied*, 441 U.S. 967 (1979). In *Smith*, the defendant's own confession contained information similar to Mickens' "facts": Smith met his victim on an isolated beach and engaged her in friendly conversation as she accompanied him to a wooded area, and there were no defensive wounds. *Id.* at 142. Smith, however, had not claimed that intercourse was consensual. *Id.* This evidence was found insufficient as a matter of law to present a defense of consent. *Id.* Of course, this Court has recognized that murder is "a fate more frequent among rape victims than friendly sex partners." *Calderon v. Thompson*, 523 U.S. 538, 561 (1988) (citation omitted).

but because neither the facts nor Mickens' testimony was compatible with such a strategy."[25]

(JA 294). The Fourth Circuit correctly upheld the district court's fact-intensive finding that consent was not a viable defense strategy. (JA 374-375).

2. Negative Information

Mickens also argues that Saunders' inability to use confidential information about Hall's juvenile charges resulted in Saunders' failure to investigate Hall's background to develop "negative information" about his victim and his relationships with his family as part of his sentencing defense. Again he relies on the unsubstantiated rumors after Hall's murder suggesting homosexual activities. He also relies on Hall's "criminal record," consisting entirely of the two dismissed juvenile charges, but such record likely was not admissible and "had no utility

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[25] The district court's findings concerning Saunders' credibility cannot be avoided on the basis of Mickens' dubious argument that the courts below erroneously applied a "subjective" test in finding no "adverse effect," or relied on counsel's "motivation" rather than an "objective" analysis. In *Burger*, this Court upheld the district court's findings crediting trial counsel's testimony as the basis for its conclusion that no "actual conflict" had been established. 483 U.S. at 785. *Burger* teaches that it would be "most inappropriate, and factually unsupportable" to speculate that Saunders' representation of Mickens was "tainted by . . . improper motivation" in the face of the district court's "heavily fact-based rulings." *Id.* Moreover, the district court's findings concerning the plausibility of alternative strategies are based entirely on an objective assessment of the record.

as an alternative strategy." (JA 295). Moreover, the district court and the *en banc* Fourth Circuit both correctly rejected finding a plausible or viable strategy in using the information of Hall's assault charge to "impeach" Hall's mother's 1996 victim impact statement because it was "fraught with risk" (JA 297), and "choosing not to vilify the mother of the victim cannot be the mark of incompetent counsel by any measure." (JA 375).[26]

Saunders' duty to maintain Hall's confidences never prevented Keeling, who was the attorney responsible for sentencing, from considering negative information about Hall. The district court found that Keeling had the same information from public sources that Saunders learned while representing Hall, and Keeling believed it insufficient to support any defense.[27] (JA 296).

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[26] Mickens' "attack-the-victim's-mother" strategy can be hypothesized only in hindsight. The Virginia Supreme Court did not approve the admission of "victim impact" evidence in a Virginia trial until November 1994, well after Mickens' original trial. *See Weeks v. Commonwealth*, 450 S.E.2d 379, 389 (Va. 1994), *cert. denied*, 516 U.S. 829 (1995). Of course, the Commonwealth did not present any "victim impact" evidence during the first sentencing in 1993, and only the written statement required by the intervening change in state law was presented in the final judge sentencing in 1996. Juvenile Court Judge Foster cannot be charged with notice of a "particular conflict" based on her failure to have predicted that the Virginia General Assembly would enact legislation allowing the limited use of victim impact statements. *See* 1993 Va. Acts of the Gen. Assembly, c. 978.

[27] The newspaper article Mickens has relied upon recited that Hall had been charged with assaulting his mother; the police had "picked him up" for carrying a concealed weapon; he had been kicked out of his mother's house; and he had a social worker. (JA 397-398).

Even assuming as an abstract matter that "attacking the victim" in a murder prosecution ever can be a plausible and viable sentencing defense, it was inconsistent with Mickens' own testimony denying fault and asserting regret at the death of Hall. (JA 295). Such a strategy would turn on persuading the sentencing jury that a life sentence was more appropriate because Mickens chose as his victim a teenage boy who might have had some difficulties in his relationship with his mother and who had been charged with carrying a concealed bread knife in his car. The same jury would know that Mickens had committed several forcible sodomies, including one in prison, and, beyond a reasonable doubt, had brutally attacked and stabbed Hall 143 times. It is virtually unthinkable that any competent attorney would have *continued* to "attack the victim" in the courtroom, and the "propensity of that approach to backfire" made it an implausible sentencing strategy here. (JA 295).

3. Unrelated "Deficient" Investigation

In the district court, Mickens raised several allegations concerning the adequacy of Saunders' investigations into matters that had no connection to his previous representation of Hall. For example, Mickens alleged that Saunders failed to investigate information he had obtained from police reports suggesting the existence of an "alternative perpetrator." The district court correctly found that Saunders' failure to investigate these leads was not "inherently in conflict with" the previous representation of Hall or otherwise related to the alleged

conflict (JA 299-303), and the Fourth Circuit agreed. (JA 376-377).

Sullivan obviously requires that the alleged adverse effects in fact be the *effects* of the alleged conflict. In rejecting Mickens' "inadequate investigation" claims as unrelated to any conflicting interest, the Fourth Circuit simply followed *Sullivan*'s command that a Sixth Amendment violation requires showing that an actual conflict *adversely affected* the representation. After all, the whole point of *Sullivan* is to distinguish the category of "actual conflicts" that violates the Sixth Amendment from the mass of potential and abstract conflicts which do not.

Mickens' case demonstrates the wisdom of the *Sullivan* rule. After a full hearing, the courts below agreed that Saunders' potential conflict of interest had no adverse effect on Mickens' defense and that Mickens had received a fair trial. (JA 309-310, 379). The absence of any impairment of the defense only underscores the necessity for *Sullivan*'s standard in collateral challenges to presumptively valid state court judgments.

CONCLUSION

The judgment of the Court of Appeals should be affirmed and the stay of execution vacated.

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